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No. 87-1765

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1987

NICHOLAS MELLAS and HARRY MARTIN (deceased),

Petitioners,

vs.

THOMAS PATRICK WALSH,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

I. Did the Seventh Circuit correctly hold that petitioners were not entitled to qualified immunity: (a) where petitioners waived the defense by not raising it in their summary judgment motion and by only making obscure references to their good faith at trial and in selected pleadings; and (b) where the parameters of the constitutional right petitioners violated were clearly established in 1979 at the time they acted?

II. Is the Seventh Circuit's holding that petitioners violated respondent's eighth amendment rights by failing to institute any procedures for reviewing inmate files prior to cell placement in conflict with a Fifth Circuit decision finding no violation where existing procedures proved inadequate?

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

STATEMENT OF THE CASE

Respondent Thomas P. Walsh agrees with petitioners' recitation of the facts underlying this matter and with petitioners' recitation of the procedural history of Walsh v. Brewer, 733 F.2d 473 (7th Cir. 1984) ("Walsh I"), but disagrees with petitioners' characterization of the second opinion of the court of appeals in Walsh v. Mellas, 837 F.2d 789 (7th Cir. 1988) ("Walsh II"). Therefore, respondent will only include a brief statement of the underlying facts and will set forth his own statement of the opinion below.

This matter arises out of the strangulation of respondent by his cellmate, a member of a prison gang, at Stateville Correctional Center in Joliet, Illinois. The district court found that respondent had been targeted for attack by prison gangs; that the risk of assault under those circumstances was real and significant; and that petitioners devised and operated a security system which ignored that

risk. (Pet. App. at 39.)[1/] Based upon its findings, the district court awarded Walsh $2,500 as compensation for personal humiliation and mental anguish caused by the deprivation of his constitutional rights. Further, the district court awarded punitive damages of $5,000 because petitioners' conduct constituted deliberate indifference to a known hazard.

On appeal in Walsh II, petitioners argued, inter alia, that they were entitled to qualified immunity and that the district court failed to apply the proper eighth amendment standards. The court of appeals rejected both arguments. First, the court held that the petitioners had waived the qualified immunity defense because petitioners did not raise the issue in their summary judgment motion and made only obscure references to the defense in selected pleadings. The court stated that "the mere fact that an obscure reference to defendants' 'good faith' is contained in one of the defendants' pleadings does not suffice to preserve that issue for appeal." (Pet. App. at 20.)

Alternatively addressing the merits of petitioners' qualified immunity defense, the court of appeals rejected petitioners' argument that they were entitled to immunity. The court held that the parameters of the constitutional right petitioners violated were sufficiently clear in light of prior decisional law, citing as an example, Spence v. Staras, 507 F.2d 554 (7th Cir. 1974). Relying on Anderson v. Creighton, 107 S. Ct. 3034 (1987), the court held that liability may be imposed where, in light of preexisting law, the unlawfulness of the official's conduct is apparent. Accordingly, petitioners could not assert that they acted in good faith. (Pet. App. at 22-23.)

1/ The district court initially entered a finding of no liability. (Pet. App. at 29.) The Seventh Circuit reversed and remanded the matter in Walsh I. (Pet. App. at 31-37.)

REASONS FOR DENYING THE WRIT

I. THE QUESTIONS PERTAINING TO QUALIFIED IMMUNITY DO NOT MERIT THIS COURT'S ATTENTION AND WERE DECIDED CORRECTLY BELOW.

A. The Question Whether Petitioners Waived The Affirmative Defense Of Qualified Immunity Does Not Merit This Court's Attention And Was Decided Correctly Below.

Petitioners do not dispute that the defense of qualified immunity may be deemed waived if not properly and timely presented to the district court. Rather, petitioners complain that the court of appeals erred in concluding, based upon the record established in the original trial on the merits, the first appeal, and the proceedings on remand, that petitioners "failed to bring the argument to the [district] court's attention, despite their having numerous opportunities to do so" (Pet. App. at 19), and did not raise it in the initial appeal. (Pet. App. at 21.) Petitioners invite this Court to re-review the extensive record below and second-guess the conclusion of the court of appeals. This matter does not merit the attention of this Court.

Moreover, the court of appeals correctly concluded that petitioners' failure to raise qualified immunity precluded the district court from making certain findings and therefore constituted a waiver of the defense. The court observed (Pet. App. at 21):

> [F]actual questions may have been implicated as to which the judge made no finding because the issue was not directly raised and equally, where consideration underlying a subtle legal issue could have been exposed and distilled by the district court so as to facilitate more informed consideration by [an appellate] court.2/

2/ Qualified immunity protects "public officials from the 'broad ranging discovery' that can be particularly disruptive of effective government. For this reason, [this Court has] emphasized that qualified immunity questions should be resolved at the earliest possible stage of a litigation." Anderson v. Creighton, 107 S. Ct. 3034, 3042 n.6 (1987), quoting Harlow v. Fitzgerald, 457 U.S. 800, 817 (1982). The (Footnote Continued)

The court of appeals properly relied upon the decisions in Ohio Casualty Insurance Co. v. Bazzi Construction Co., Inc., 815 F.2d 1146 (7th Cir. 1986), and National Fidelity Life Insurance Co. v. Karaganis, 811 F.2d 357 (7th Cir. 1987), to hold that petitioners' few obscure references to "good faith" failed to present, and thus preserve, the qualified immunity defense. In Ohio Casualty, the plaintiff mentioned the exclusionary provisions of an insurance contract in one of its memoranda but failed to explain the significance of these provisions to the district court. 815 F.2d at 1149. In National Fidelity, the plaintiff failed to address the significance of an issue mentioned in its complaint. 811 F.2d at 360. In each case, the court held that a party must "press" an issue to the district court by explaining its relevance and significance to preserve it for appeal; mere mention, or obscure references, do not suffice. (Pet. App. at 19-20.)

Petitioners also argue that they were excused from raising qualified immunity in their motion for summary judgment because the standards for qualified immunity prior to this Court's decision in Harlow v. Fitzgerald, 457 U.S. 800 (1982), included a subjective good faith component that was within the province of the jury. (Pet. at 16.) Petitioners' argument that good faith could not be decided on summary judgment before Harlow, however, is erroneous. See, e.g., Procunier v. Navarette, 434 U.S. 555 (1978); Henzel v. Gerstein, 608 F.2d 654, 658-59 (5th Cir. 1979). In any event, as the court of appeals found, petitioners' waiver extended beyond the summary judgment proceedings through trial, appeal, and remand.

(Footnote Continued)
court of appeals concluded that petitioners' delay in pursuing qualified immunity frustrated these important goals. (Pet. App. at 20 n.7.)

B. The Question Whether Petitioners Are Entitled To Qualified Immunity Does Not Merit This Court's Attention And Was Decided Correctly Below.

Even if an adequate record had been made below concerning the belated claims of qualified immunity, the question petitioners would put to this Court is of no significance beyond this case: whether the state of precedent in 1979 was sufficiently clear to inform petitioners of their constitutional obligations to respondent. This question likewise does not merit the attention of this Court.

Petitioners' efforts to distinguish between their conduct and respondent's cause of action is unavailing, and creates no "cert-worthy" question. As the court of appeals noted (Pet. App. 22-23), this Court's recent decision in Anderson v. Creighton, 107 S. Ct. 3034, 3039 (1987), held that an official cannot escape liability based upon qualified immunity as long as "[t]he contours of the right" he is alleged to have violated were sufficiently clear so that a reasonable official would understand that what he is doing violates that right. As this Court observed: "This is not to say that an official action is protected by qualified immunity unless the very action has been held unlawful but it is to say that in the light of preexisting law the unlawfulness must be apparent." Id. (emphasis added; citation omitted). See also Wade v. Hegner, 804 F.2d 67, 71 (7th Cir. 1986) (under Harlow the objective inquiry focuses on whether the legal norms governing official's behavior were clearly established).[3/]

3/ In Little v. Walker, 552 F.2d 193, 197 (7th Cir. 1977), cert. denied, 435 U.S. 932 (1978), the Seventh Circuit warned that a prison official:

> cannot hide behind a claim that the particular factual predicate in question has never appeared in haec verba in a reported opinion. If the application of settled principles to this factual tableau would inexorably lead to a

(Footnote Continued)

The contours of the right of prison inmates to be protected from inmate-on-inmate attacks were well established before petitioners' unlawful conduct. Deliberate indifference to such attacks was a constitutional violation. See, e.g., Little v. Walker, 552 F.2d 193, 197 (7th Cir. 1977), cert. denied, 435 U.S. 932 (1978); Finney v. Arkansas Board of Corrections, 505 F.2d 194, 201 (8th Cir. 1974); Woodhous v. Commonwealth of Virginia, 487 F.2d 889, 890 (4th Cir. 1973). That the courts below vindicated this preexisting constitutional right by following a line of analysis that was subsequently labelled "the identifiable group theory" of liability does not mean that respondent's rights, or petitioners' duties, were any less obvious. Given the clear law establishing a constitutional obligation to protect inmates from violent inmate attack, a reasonable official would have understood that he had an obligation to protect identifiable groups of prisoners for whom the risk of assault is a serious problem.

Moreover, in light of preexisting law, the unlawfulness of petitioners' conduct was apparent. Anderson v. Creighton, 107 S. Ct. at 3039. Decisional law prior to petitioners' deprivation of respondent's rights indicated that petitioners would be subject to liability if they failed to take adequate steps to protect individuals or identifiable groups in prison subject to the risk of assault, even in the absence of pervasive violence. See Spence v. Staras, 507 F.2d 554, 557 (7th Cir. 1974); West v. Rowe, 448 F. Supp. 58, 60 (N.D. Ill. 1978); McCary v. Sullivan, 509 F.2d 1332, 1334 (5th Cir. 1973), cert. denied, 423 U.S. 859 (1975).

(Footnote Continued)
conclusion of unconstitutionality, a prison official may not take solace in ostracism.

II. THE DECISION OF THE SEVENTH CIRCUIT DOES NOT CONFLICT WITH THE DECISION OF THE FIFTH CIRCUIT IN JOHNSTON V. LUCAS.

Petitioners also attempt to persuade this Court to grant the writ of certiorari by asserting that the decision below conflicts with the Fifth Circuit's decision in Johnston v. Lucas, 786 F.2d 1254 (5th Cir. 1986). Johnston, however, does not conflict with the decision below. To the contrary, the two courts of appeals applied the same legal standard to determine whether the conduct of the defendant prison officials amounted to an eighth amendment violation: did the prison officials' conduct constitute deliberate indifference. Compare Pet. App. at 8-18 with Johnston v. Lucas, 786 F.2d at 1260.

In Johnston, the inmate plaintiff was stabbed after a known enemy of the plaintiff was placed in the same building with plaintiff. The district court held that defendants violated the eighth amendment by not implementing adequate procedures that would have prevented the stabbing. 786 F.2d at 1259-60. It premised that holding, however, upon a finding that defendants were negligent, but not consciously indifferent, in failing to prevent the stabbing. The court of appeals reversed, holding that the district court's factual finding that the defendant prison officials did not act with "conscious indifference" precluded finding an eighth amendment violation. Id.

In contrast, the district court in this case found as one of its findings of fact that the defendants before it had acted with "deliberate indifference" to respondent's rights. (Pet. App. at 39.) The court of appeals held that the eighth amendment was violated because, in spite of petitioners' knowledge of the risk of gang-related violence against individuals targeted by gangs, they completely failed to institute procedures to determine whether an inmate to be placed in the same cell with a gang member was targeted by the gang. (Pet. App. at 12.) Furthermore, the court of appeals, upon careful review of the record, affirmed

the district court's underlying findings of fact as "not clearly erroneous." (Pet. App. at 14-18.)[4/]

The different outcomes in Johnston and the case at bar result from factual differences in the two cases. There is no conflict among the circuits.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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4/ Petitioners also assert, without any factual support in the record, that the holding below "presents prison officials with an impossible task." (Pet. at 14-15.) The court of appeals expressly considered the increased burden in this case, and found that such concerns were outweighed by the real and obvious threats to human life that exist in maximum security prisons. (Pet. App. at 16.) The court found that any increased administrative burden upon the prison system would be "inconsequential when compared with the value of a proper screening process protecting human life and curbing gang-related violence." (Id.)